No. 78-603

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

MARY BROWNE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-9a) is not yet reported.

JURISDICTION

The order of the district court declaring unconstitutional and enjoining appellant from enforcing part of 42 U.S.C. (1970 ed. and Supp. V) 607 was entered on June 13, 1978 (App. B, *infra*, 10a-11a). A notice

of appeal to this Court (App. C, *infra*, 12a-14a) was filed on July 11, 1978. On August 31, 1978, Mr. Justice Brennan extended the time for docketing the appeal to and including October 9, 1978 (a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975).

QUESTION PRESENTED

Whether Section 407 of the Social Security Act, which provides AFDC benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of his father but does not provide benefits when the mother becomes unemployed, is consistent with the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. (1970 ed. and Supp. V) 607, is set forth in App. D, *infra*, 15a-18a.

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. (1970 ed. and Supp. V) 601 *et seq.*, provides financial assistance to families with needy dependent children. If a state elects to participate in the program, it must comply with

the requirements set forth in 42 U.S.C. (Supp. V) 602(a) and the applicable federal regulations, and its plan must be approved by the Secretary of Health, Education, and Welfare in order for the state to qualify for federal reimbursement of a percentage of its expenditures. 42 U.S.C. (1970 ed. and Supp. V) 602-603. If a state that participates in the AFDC program also participates in the Medicaid program, persons who receive AFDC benefits are entitled to receive Medicaid benefits. 42 U.S.C. (Supp. V) 1396a(a)(10).

The AFDC program benefits are intended to assist needy "dependent" children. The program originally was limited to children who were needy and had been deprived of the support of one parent because of death, absence, or incapacity. 42 U.S.C. 606(a); *Batterton* v. *Francis*, 432 U.S. 416, 418 (1977). The Act now also provides assistance to certain families where both parents are present and neither is disabled. Section 407(a) of the Act, 42 U.S.C. 607(a), defines the term "dependent child" to include a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *." This portion of the program is known as Aid to Families with Dependent Children-Unemployed Father ("AFDC-UF"). Although every state participates in the AFDC program, only 26 states (and the District of Columbia) participate in the AFDC-UF program. Pennsylvania participates in the AFDC-UF program.

2. In January 1976 appellee Mary Browne, who is married and has four children, became unemployed. She applied for AFDC-UF benefits, and in January 1977 the Pennsylvania Department of Public Welfare notified her that her family was ineligible for AFDC-UF benefits because her husband, appellee Clarence Browne, although out of work, did not have a sufficient work history to qualify as an "unemployed" father.[1]

The Brownes then instituted this action in the United States District Court for the Eastern District of Pennsylvania, naming as defendants the Secretary of Health, Education, and Welfare and the Secretary of the Pennsylvania Department of Public Welfare.[2] Appellees contended that Section 407 of the Social Security Act discriminates on the basis of gender in violation of the Due Process Clause of the Fifth

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[1] The Department of Public Welfare had provisionally approved the Brownes' application for AFDC benefits, because of the possibility that Clarence Browne could establish that he was not working because he was physically incapacitated (see App. A, *infra*, 3a). The Department of Public Welfare ultimately determined, however, that Clarence Browne was not physically disabled and, accordingly, that the family could receive AFDC benefits only if it qualified under the AFDC-UF program.

[2] On the basis of the defendants' agreement to acquiesce in the statewide application of any decision by the court declaring Section 407 to be unconstitutional (App. A, *infra*, 1a n.1), the court denied appellees' motion to certify the case as a class action.

Amendment.[3] Appellees sought declaratory and injunctive relief extending the AFDC-UF program to families in which the mother is unemployed.

The district court concluded that Section 407 violates the Due Process Clause. It stated that *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), establishes that gender-based classifications are unconstitutional unless they " 'serve important governmental objectives and [are] substantially related to achievement of those objectives.' " The court reviewed the legislative history and concluded (App. A, *infra*, 6a) that the purposes of the AFDC-UF program are to provide for needy children in families in which the breadwinner is unemployed, and to do so in a manner that does not provide an incentive for the breadwinner to desert so that the family would be eligible for welfare (*ibid.*). The court found that the gender distinction in Section 407 is "totally unrelated to" these objectives (*id.* at 5a). The court stated that families in which the mother has been the breadwinner are needy when the mother becomes unemployed. In such cases, the court concluded, the AFDC-UF program encourages parental desertion, because the family becomes eligible if either parent leaves the home. The court stated that the "true reason" for the gender distinction is that identified in *Stevens* v. *Califano*,

---

[3] Appellees also contended that the implementing state regulation, Pennsylvania Department of Public Works Manual § 3122.44, violates the Equal Protection Clause of the Fourteenth Amendment. The district court did not rule on this contention (see Pet. App. 4a n.2).

448 F. Supp. 1313, 1321 (N.D. Ohio 1978), appeal pending, No. 78-449:

> Congress simply presumed that there were so few families which were dependent upon the earnings of the female parent, that it was unnecessary to provide aid to such families when the female parent became unemployed.

Finally, the court concluded that the proper remedy is the extension of the AFDC-UF program to all families with needy dependent children if either parent is unemployed within the meaning of the Act (App. A, *infra*, 8a-9a).

THE QUESTION IS SUBSTANTIAL

This case involves the same statute, and the same constitutional question, as *Califano* v. *Westcott*, appeal pending, No. 78-437, and *Califano* v. *Stevens*, *supra*.[4] For the reasons stated in the jurisdictional statement in *Westcott*, the constitutional question should be given plenary review by this Court.

[4] We have furnished a copy of the jurisdictional statements in *Westcott* and *Stevens* to counsel for appellees in this case.

CONCLUSION

The appeal should be held pending the Court's decisions in *Califano* v. *Westcott*, *supra*, and *Califano* v. *Stevens*, *supra*, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 77-1249

MARY and CLARENCE BROWNE, ET AL.

v.

JOSEPH CALIFANO, ET AL.

MEMORANDUM AND ORDER

CAHN, J. June 9, 1978

Plaintiffs have brought this action to challenge the constitutionality of § 407 of the Social Security Act, 42 U.S.C. § 607 (hereinafter § 607), and of state regulations implementing the statute. Before the court are cross-motions for summary judgment.[1] Two district courts have recently decided identical actions, both ruling in plaintiffs' favor. *Westcott* v. *Califano*, No. 77-222-F (D. Mass. April 20, 1978); *Stevens* v.

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[1] Plaintiffs have moved the court to certify a class of all parties living in Pennsylvania who are similarly situated to the Browne family. Since only prospective injunctive relief is sought and since defendants have agreed to acquiesce in the statewide application of my decision if I declare § 607 to be unconstitutional and the decision is not overturned on appeal, I do not believe class certification is appropriate or necessary to protect the class. Accordingly class certification will be denied.

Califano, No. 77-103A (N.D. Ohio April 10, 1978). *Cf. Schneider* v. *McNutt*, No. 213-7303 (W.D. Wash. March 30, 1977). Since I am in full agreement with the opinions of Judges Freedman and Contie in those cases, I also find for the plaintiffs. While I shall briefly outline the reasons for my decision below, the availability of those opinions obviates the need for a detailed decision which would only clog the Federal Supplement with redundant material.

FACTS

42 U.S.C. § 606(a), enacted in 1935, provides for social security benefits to families with a child:

> (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; . . .

Section 607 was enacted to expand the definition of § 606(1) to include families with a child:

> [W]ho has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father. . . .

Through § 607, two-parent families in which the father has become unemployed are now entitled to the benefits previously enjoyed only by one-parent families. In enacting § 607, however, Congress specifically precluded the application of the statute to two-parent families where a child is deprived of parental support through the unemployment of its mother. Plaintiffs contend that this distinction is unconstitutional.

Plaintiffs are members of a family in which the mother, Mary Browne, has been the "breadwinner" since 1969. Clarence Browne, the father, lives at home. He ceased working in 1969 and has, since that time, stayed at home to care for the family's children and to attend to the needs of the household.

On January 16, 1976, Mary Brown became unemployed, and found herself unable to secure a new position. The Brownes received AFDC benefits until January of 1977, but were then found ineligible for further benefits. It is undisputed that the sole basis for the current denial of benefits under § 607 is that a "mother-breadwinner" rather than the "father-breadwinner" has become unemployed, and that the statute specifically precludes the extension of benefits to families in that circumstance even though they are identically situated to families in which a father-breadwinner has become unemployed.

The plaintiffs and defendant Califano have filed cross-motions for summary judgment, and stipulate that there are no facts in dispute. Plaintiffs contend that the statutory scheme providing aid to needy two-parent families where the father is unemployed but denying similar aid to needy two-parent families where the mother is unemployed violates the Fifth and Fourteenth Amendments to the United States Constitution. Defendant Califano concedes that the statute creates a sex-based classification, but argues that the classification is a reasonable one. Defendant Beal agrees with plaintiff that the federal statute is unconstitutional. He contends, however, that since the state has no authority to alter the statute, plaintiffs have no cause of action against the state.[2]

---

[2] Although my decision does not reflect any belief that the State of Pennsylvania has acted improperly with respect to the issues in the instant action, I must nevertheless reject the state's standing argument. The State has attempted to provide families such as the Browne family with state benefits roughly analogous to the federal benefits denied pursuant to § 607. However, an affidavit filed by Mary Browne establishes that the State does not provide several benefits incidental to participation in the AFDC program, such as registration in federal work incentive projects. Thus plaintiffs have established that they are being injured by the application of the § 607 exclusion to them. Furthermore, the State is responsible for administering the AFDC program in Pennsylvania pursuant to 55 Pa. Code § 153.41, *et seq.* (formerly Pa. DPW Man. § 3122.44), albeit under the direction of defendant Califano. The State is therefore properly named as a party; it is ultimately the State which must perform the physical acts of granting the plaintiffs the remedy they seek.

DISCUSSION

The standard for testing gender-based classifications is not altogether clear. While the Supreme Court has established that some test stricter than a "rational basis" test should be applied to such classifications, *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971), the majority of the Supreme Court appears to have rejected the notion that a full "strict scrutiny" test is appropriate. *Frontiero* v. *Richardson*, *supra*. *See also Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). I agree with Judges Contie and Freedman that the proper test to apply to the classification at issue here is the one enunciated in *Craig* v. *Boren*, 429 U.S. 190, *reh. denied* 429 U.S. 1124 (1976), which lies somewhere between the "rational basis" and strict scrutiny standards. "To withstand constitutional challenge, previous cases established that classifications must serve important governmental objectives and must be substantially related to achievement of those objectives." *See also Califano* v. *Webster*, 430 U.S. 313 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). I also agree with Judges Contie and Freedman that the classification produced by the statute at issue is totally unrelated to the "achievement" of the legitimate "objectives" of the statute and therefore renders the statute unconstitutional.

A review of the legislative history demonstrates that the objectives of the AFDC and AFDC-U programs are twofold. First, Congress wished to protect and provide for the care of needy children of families where their alternative means of support have been cut off through the unemployment of the family's breadwinner. *Cf. King* v. *Smith*, 392 U.S. 309, 327 (1968). Second, Congress wished to provide this support within a framework which did not provide economic incentives for the unemployed breadwinner to desert the family so that the family could become entitled to welfare benefits. *See, Westcott* v. *Califano, supra*, slip. op. at 22-26; *Stevens* v. *Califano, supra*, slip op. at 12-21.

Defendants have made no showing that families such as the Browne family whose "mother-breadwinners" have become unemployed are in less need of the congressional protection than those in which father-breadwinners have lost their method of earning a living. The challenged statute can therefore not be upheld as being in furtherance of that objective. Nor can it be supported on the second basis, since Congress increased the possibility of family instability by creating the gender-based classification of § 607. Under the statutory scheme, a two-parent family with an unemployed female breadwinner may not receive AFDC benefits, but will receive benefits if either parent chooses to leave the home. Furthermore, the scheme utterly ignores the possibility that an unemployed mother may desert the family, just as the father may leave the home. Thus, even if the

statute is designed to promote family stability, in operation it has the opposite effect. Accordingly, the classification it creates cannot be validated on the grounds that the statute serves and fosters the familial stability objective.[3]

As Judge Freedman points out in *Stevens* v. *Califano, supra*, slip op. at 16, the true reason for which Congress enacted the blatantly discriminatory statute at issue probably has little to do with the stated objectives of the statute.

> It can be assumed, however, that Congress simply presumed that there were so few families which were dependent upon the earnings of the female parent, that it was unnecessary to provide aid to such families when the female parent became unemployed.

The Supreme Court established in *Weinberger* v. *Wiesenfeld, supra*, at 654, that classifications based on the presumption that it is the father's rather than the mother's role to provide economic support for the family unit are unconstitutional. Consequently, it is clear that the statute cannot withstand scrutiny

---

[3] Defendant Califano also urges that one of the statute's objectives is the "minimization of abuse" by preventing families with unemployed mothers (rather than unemployed fathers) but with working fathers from claiming benefits. That objective can be carried out simply by proscribing claims where either parent is employed. The gender-based classification actually enacted, however, is neither necessary nor particularly conducive to the abuse-prevention objective which defendant asserts. *See* Jiminez v. Weinberger, 417 U.S. 628, 637 (1974).

under the equal protection clause. *See also Califano* v. *Goldfarb, supra.*

RELIEF

Having concluded that § 607 is unconstitutional, I must now decide whether to enjoin its application *in toto*, leaving it to Congress to enact a substitute statute which does not run afoul of constitutional considerations, or to order defendants to extend the benefits of § 607 to parties situated similarly to the plaintiff. The parties have stipulated that, under the circumstances of this case, the more appropriate remedy is extension of the benefits and I agree.

The AFDC-U program is remedial in nature. Thus, it would more nearly coincide with Congressional intent to extend the benefits than to eliminate payments to needy families with male breadwinners. Furthermore, the severability clause of the Social Security Act, 42 U.S.C. § 1303, reflects Congress's desire that if any part of the Act is declared invalid, the remainder of the Act should stand and the benefits of the Act should, insofar as possible, be continued. For these reasons, I believe the appropriate remedy is the extension of the benefits. *See Welsh* v. *United States*, 398 U.S. 333 (1970) (Harlan, J. concurring). *Cf. Weinberger* v. *Wiesenfeld, supra; Califano* v. *Goldfarb, supra* (benefits extended).

I therefore grant plaintiff's Motion for Summary Judgment and deny the cross-motions of the defendants. Section 607 is declared unconstitutional insofar as it establishes a gender-based classification discriminating against families with children deprived of support due to the unemployment of their breadwinner mothers. Defendant Califano will be enjoined from enforcing § 607 in violation of this opinion and will be ordered to provide funding for the extension of the benefits of the AFDC-U program to plaintiffs and parties similarly situated. Defendant Beal will be enjoined to administer the AFDC program pursuant to 55 Pa. Code § 153.41 *et seq.* so as to treat plaintiffs and others similarly situated as entitled to benefits to the same degree as families whose breadwinner-fathers are unemployed.

EDWARD N. CAHN, J.
/s/ Edward N. Cahn

Entered 6/13/78

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 77-1249

MARY and CLARENCE BROWNE, ET AL.

v.

JOSEPH CALIFANO, ET AL.

ORDER

AND NOW, this 9 day of June, 1978, upon consideration of plaintiffs' Motion for Summary Judgment and defendant Califano's Cross-Motion for Summary Judgment, IT IS ORDERED that plaintiffs' Motion is GRANTED and defendant's Motion is DENIED.

IT IS FURTHER ORDERED, consistent with the within opinion, that 42 U.S.C. § 607 is declared unconstitutional insofar as it provides benefits to families with children deprived of financial support due to the unemployment of their fathers but denies benefits to families with children deprived of financial support due to the unemployment of their mothers. Defendant Califano is ENJOINED from enforcing 42 U.S.C. § 607 in violation of this order and is ORDERED to provide funding for the extension of the benefits provided by 42 U.S.C. § 607 to plaintiffs and parties similarly situated. Defendant Beal is EN-

JOINED to apply 42 U.S.C. § 607, pursuant to 55 Pa. Code § 153.41 *et seq.* (formerly Pa. DPW Man. § 3122.44) so as to treat plaintiffs and others similarly situated as entitled to benefits to the same degree as families whose fathers are unemployed.

BY THE COURT:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 77-1249

MARY and CLARENCE BROWNE, ET AL., PLAINTIFFS

v.

JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare

and

FRANK BEAL, Secretary of the Pennsylvania Department of Public Welfare
DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the defendant, Joseph Califano, Secretary of the Department of Health, Education and Welfare, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252 and § 2101, from the Order of the District Court entered in this action on June 13, 1978.

Dated at Philadelphia, Pennsylvania, this 11th day of July, 1978.

/s/ Robert N. deLuca
ROBERT N. DELUCA
United States Attorney

/s/ Alexander Ewing, Jr.
ALEXANDER EWING, JR.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 77-1249

MARY and CLARENCE BROWNE, ET AL., PLAINTIFFS

v.

JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare

and

FRANK BEAL, Secretary of the Pennsylvania Department of Public Welfare
DEFENDANTS

AFFIDAVIT OF SERVICE

COUNTY OF PHILADELPHIA)
) ss.
STATE OF PENNSYLVANIA)

ALEXANDER EWING, JR., being first duly sworn, on his oath deposes and says:

1. That he is an attorney of the Department of Justice, United States Attorney's Office, Philadelphia, Pennsylvania, and an attorney for defendant, Joseph Califano, Secretary of the Department of Health, Education and Welfare.

2. That on the 11th day of July, 1978, he mailed, first class, postage prepaid, a copy of the Notice of

Appeal to the Supreme Court of the United States filed in the above-styled action to counsel as follows:

Ellen Josephson, Esquire
Community Legal Services, Inc.
Law Center North Central
Beury Building
3701 North Broad Street
Philadelphia, PA 19140

Margaret Hunting
Deputy Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
Harrisburg, PA 17120

/s/ Alexander Ewing, Jr.
ALEXANDER EWING, JR.
Assistant United States Attorney
3310 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Phone: 597-2716

Sworn to and subscribed before
me this 11th day of July, 1978.

/s/ Virginia Dektor
Deputy Clerk, U.S. District Court

APPENDIX D

Section 407 of the Social Security Act, 75 Stat. 75, as amended, 42 U.S.C. (1970 ed. and Supp. V) 607, provides:

> (a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.
>
> (b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.
>
> (1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—
>
> (A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,
>
> (B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application of such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be certified to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b) (1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified, to certify such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar

quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 275424 142

In the Supreme Court of the United States

October Term, 1978

No. 78-603

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant

v.

MARY BROWNE, et al.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM

MARGARET HUNTING
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Acting Attorney General
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Harrisburg, Pennsylvania 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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TABLE OF CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-608

JOSEPH A. CALIFANO, Secretary of Health Education, and Welfare,

Appellant

v.

MARY BROWNE, et al.,

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

Appellee Aldo Colautti[1], Secretary of the Pennsylvania Department of Public Welfare, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final order of the District Court of the Eastern District of Pennsylvania be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

[1] Frank Beal, the Secretary of the Pennsylvania Department of Public Welfare at the time this action was filed was the named defendant representing the Pennsylvania Department of Public Welfare in the Court below. Former Secretary Beal resigned from office during the pendency of the action and was replaced by Aldo Colautti as Acting Secretary on February 16, 1978. Secretary Colautti was appointed Secretary on May 1, 1978 and should be substituted as appellee pursuant to Supreme Court Rule 48(3).

STATEMENT

This is a direct appeal from the final order of the District Court filed June 12, 1978, granting appellee Mary Browne's cross motion for summary judgment, denying appellant Califano's motion for summary judgment and declaring unconstitutional section 407 of the Aid to Families with Dependent Children subsection of the Social Security Act of August 14, 1935, 42 U.S.C.A. §607 (Supp. 1978).

Section 407 of the Social Security Act makes available the financial benefits of the Aid to Families with Dependent Children Program (AFDC) to two-parent families with children in which the father, but not the mother, is unemployed.[2] In January, 1977, this section was applied to deny benefits to Mary Browne and her family. There is no dispute that had Mary Browne been a male, she and her family would have qualified to receive benefits under section 407.

As a state participating in the federal AFDC program, Pennsylvania must conform its regulations and its distribution of benefits to the requirements of federal law. 42 U.S.C.A. §§601-04 (Supp. 1978). When a participating state makes available a financial grant to needy families who qualify under the federal requirements, the state receives federal reimbursement of a percentage of its expenditures. 42 U.S.C.A. §603 (Supp. 1978). Similarly, if a family is found ineligible for AFDC, there is no federal reimbursement regardless of

[2] The Aid to Families with Dependent Children Program—unemployed fathers—will hereinafter be referred to as AFDC-U.

the cost of the families' maintenance. In the present case, when Mary Browne was found to be ineligible for AFDC benefits as an unemployed parent because she was not a male, the family was removed from the provisional AFDC status which they were granted pending an investigation of Mr. Browne's eligibility.[3] Consequently, federal reimbursement to the Commonwealth for the financial grant to her family ceased.

In Pennsylvania, however, ineligibility for the AFDC-U program does not mean the end of financial assistance for a family. It is undisputed that Mary Browne and her family continued to receive a General Assistance grant in the same amount as their financial benefit would have been under the AFDC-U program. Although the amount is the same, the difference to the Commonwealth of Pennsylvania is significant: the General Assistance grant is paid entirely out of Commonwealth funds and the Commonwealth receives no federal reimbursement for its expenditures under this program. Thus, if Mary Browne were a male, the Commonwealth would receive reimbursement for a percentage of her financial grant; as a woman, the expense of her grant falls entirely on the Commonwealth.[4]

[3] For a more detailed explanation of the Browne family's history with AFDC, see Appellant's Jurisdictional Statement at 4 n. 1.

[4] In the District Court, appellee Secretary of Pennsylvania Department of Public Welfare, defendant below, challenged the standing of appellee Mary Browne, plaintiff below, against the Secretary in his official capacity. This position was based on two arguments: (1) Mary Browne and her family did not demonstrate that they incurred injury due to the actions of the Secretary in that the denial of AFDC benefits due to the federal requirements was recompensed by the Commonwealth in the grant

Mary Browne brought an action in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of section 407 on the grounds that its operation denied her due process and equal protection in violation of the Fifth and Fourteenth Amendments by discriminating against her on the basis of her sex. Appellee Secretary of Pennsylvania Department of Public Welfare supported Mary Browne and also urged that the section be declared unconstitutional. The District Court, relying upon the decisions of two other district courts which had recently decided the same questions,[5] granted Mary Browne's motion for summary judgment and declared section 407 of the Social Security Act and the implementing state and federal regulations unconstitutional in that they denied benefits to families with unemployed mothers which were granted to similarly situated families of unemployed fathers. The Court further ordered that benefits be extended to families, such as the Brownes, who qualified for AFDC-U participation but for the sex of the unemployed parent.

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of an equal amount through the Commonwealth funded General Assistance program; and (2) the Brownes could not obtain an order against the Secretary regarding the AFDC-U program since the Secretary is without power to change the requirements of the federal AFDC-U program and, similarly, would be compelled to implement any changes to the federal program, whether implemented by court order or federal initiative, in order to maintain an approvable state plan. 42 U.S.C.A. §§601-04 (Supp. 1978). The District Court rejected this argument. Appellant's Jurisdictional Statement at 4a n. 2.

[5] *Westcott v. Califano,* No. 77-222-F (D. Mass., April 20, 1978), *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 14, 1978); *Stevens v. Califano,* 448 F. Supp. 1313 (N.D. Ohio 1978), *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 15, 1978).

ARGUMENT

Three actions challenging the constitutionality of the classification by gender in section 407 of the Social Security Act were brought in and decided by District Courts in three circuits. *Browne v. Califano,* No. 77-1249 (E.D. Pa. June 12, 1978), *appeal docketed,* No. 78-603 (U.S. Supreme Ct., Oct. 10, 1978); *Westcott v. Califano,* No. 77-222-F (D. Mass., April 20, 1978); *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 14, 1978); *Stevens v. Califano,* 448 F. Supp. 1313 (N.D. Ohio 1978), *appeal docketed,* No. 78-437 (U.S. Supreme Ct., Sept. 15, 1978). In all three cases the courts held the challenged section unconstitutional as a violation of equal protection rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.[6]

The decisions of the lower court in the present case and the two related cases are correct. In all three decisions, the lower courts, after carefully analyzing the development of equal protection law in gender classification cases, determined that the appropriate standard for review was articulated in *Craig v. Boren,* 429 U.S. 190 (1976). The test enunciated in *Craig* has been repeated and relied upon in recent opinions of this Court concern-

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[6] " '[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." ' Schneider v. Rusk, 377 U.S. 163, 168 (1964). . . . This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2 (1974).

ing instances of alleged gender discrimination under other sections of the Social Security Act. *Califano v. Webster,* 430 U.S. 313 (1976); *Califano v. Goldfarb,* 430 U.S. 199 (1976).

Under the test developed in *Craig,* a statutory classification by gender must bear a substantial relationship to the achievement of an important governmental objective. All three district courts examined the legislative history of section 407 and concluded that the section was adopted in order to: (1) extend AFDC benefits to families who are in need of assistance due to the unemployment of the principal wage earner; and (2) to reduce instances of parental abandonment of families by removing the economic incentive for desertion which existed when benefits were provided only to single-parent families. The district courts agreed that classification by gender did nothing to further these objectives; indeed, the objectives of correcting family need and parental desertion were found to be unrelated to the gender of the employed parent. In addition, the courts observed that all indications suggested the gender classification of section 407 was, in actuality, based on archaic and overbroad assumptions arising from traditional ways of thinking about women. Reliance on such unsubstantiated presumptions is forbidden by the Constitution. *Califano v. Goldfarb,* 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973).

Appellants initially contend that the gender-based distinction apparent in the statutory section in question does not operate to the exclusive disadvantage of women and therefore should not be considered in the same category as "gender-biased" laws previously struck down by

this Court.[7] It is pointed out that the denial of benefits is equally applied and equally burdensome to women and men in the persons of the unemployed mother and her husband. This argument confuses the question by taking an overly expansive view which goes beyond the necessary limits of the classification. The statute in question grants benefits to families of men who have become unemployed after establishing the requisite work history while denying benefits to families of similarly situated women. The appropriate focus in determining the constitutionality of a statutory scheme accomplishing such a classification is on the individuals whose eligibility is determined on the basis of their sex. *See Califano v. Goldfarb,* 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71 (1971). Incidental injury to others in addition to the female wage earner—her family, children, spouse, males or other females—does not detract from the disadvantage to the woman that was imposed because she is a woman. Rather, such tangential injury lends weight to her argument. On a theoretical level, all society can be said to suffer where irrational discrimination is allowed to flourish.

There is no distinction between the denial of benefits to Mary Browne and her family and the denial of benefits to the women workers in *Califano v. Goldfarb,* 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1974); and *Frontiero v. Richardson,* 411 U.S. 677 (1973). In each of these cases a benefit available to the families of men was denied to the families of similarly situated women. The fact that men inherited or

[7] Appellant's Jurisdictional Statement at 8.

shared the discrimination inflicted on their wives did not prevent a finding that the classification was unconstitutional.

The argument that a classification cannot be considered discriminatory or subject to scrutiny when its burdens fall equally on members of the favored as well as the injured class has been previously considered and rejected by this Court in the context of racial discrimination. In *Loving v. Virginia,* 388 U.S. 1 (1966), the appellee argued that the equal application of Virginia's anti-miscegenation statutes to both white and black individuals removed the statutes from the category of racially discriminatory laws and limited review to the mildest standard: determining whether a rational basis can be demonstrated for prohibiting inter-racial marriages. This Court held that mere equal application of the statute to whites and blacks could not save the statutes from rigorous review under the Fourteenth Amendment and the strict scrutiny accorded laws which discriminate on the basis of race. *A fortiori,* in the present case, where unemployed women are denied grants made available to similarly situated men, even if it could be said that the burden of the statute falls with equal application on individual men and women, the Court is not required to review the case as if gender discrimination were not involved. The statutory section currently under consideration contains a classification based on sex which operates to the disadvantage of a female applicant. The fact that it affects men as well does not immunize the statute from the burden of justification which the Constitution requires of statutes drawn according to gender.

Appellants also maintain that it is constitutionally permissible for Congress to take one step at a time in proceeding toward the goal of eliminating the flaws in the AFDC-U program. That "one step" in this case extends benefits to fathers who are unemployed but not mothers who are unemployed within the meaning of the statute. According to appellant, Congress took this step because it had been made aware of the tendency of a statistically significant number of unemployed fathers to desert their families in order to qualify them for AFDC benefits.[8]

The Constitution, however, requires that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Reed v. Reed,* 404 U.S. 71, 76 (1971), quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).[9] For Congress to take the half step of addressing that portion of the problem which benefits needy men while neglecting that portion composed of needy women, simply because unemployed males and deserting fathers represent a greater percentage of the problem Congress sought to eradicate in adopting section 407, "is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Reed v. Reed,* 404 U.S. 71, 76 (1971); *see also Frontiero v. Richardson,* 411 U.S. 677 (1973).

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[8] Appellant's Jurisdictional Statement at 12-14.

[9] These cases interpreted the Equal Protection Clause of the Fourteenth Amendment. However, this analysis applies equally well to equal protection claims brought under the Fifth Amendment. *See* n. 6 *supra.*

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court and that the final order of the District Court should be affirmed.

CONCLUSION

The order of the District Court should be affirmed. Alternatively, if this Court should consider that the issues raised herein warrant plenary review, it should schedule this case for argument. As among the three related cases, *Califano v. Browne,* No. 78-603, *Califano v. Stevens,* No. 78-449 and *Califano v. Westcott,* No. 78-437, this case is particularly representative due to Pennsylvania's interest in expanding the federal program to its citizens.

Respectfully submitted,

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Dated: November 3, 1978